No. 92-267

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

UJB FINANCIAL CORP., et al.,

Petitioners,

v.

IRWIN SHAPIRO, ROBERT BASSMAN, JEROME KATZ, NORMAN SALTSITZ, JEAN LEE, and CHAPPAQUA FAMILY TRUST,

Respondents.

Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Do the factual allegations of the complaint allege fraud with sufficient particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure?

2. Do officers and directors of a corporation have a duty under the federal securities laws to speak truthfully when making material representations concerning the corporation's internal affairs?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

Respondents Robert Bassman, Jerome Katz, Norman Saltsitz, Jean Lee, and Chappaqua Family Trust (collectively, "Respondents") submit this brief in opposition to the petition for a writ of *certiorari*[1] filed on behalf of UJB Financial Corp. ("UJB") and certain of its officers and directors (collectively, "Petitioners"). Petitioners ask this Court to review an individual complaint to determine

[1] Respondent Irwin Shapiro is filing a separate brief in opposition to the petition for a writ of *certiorari*.

whether that complaint satisfies the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Contrary to Petitioners' claims, there is no new standard, conflict, or confusion that warrants this Court's intervention in this litigation. The petition for a writ of *certiorari* should, therefore, be denied.

STATEMENT OF THE CASE

The petition for a writ of *certiorari* concerns Respondents' consolidated complaint on behalf of a class of purchasers of UJB common stock.[2] Respondents allege that in violation of §§ 11, 12, and 15 of the Securities Act of 1933, and §§ 10(b), 14(a), and 20 of the Securities Exchange Act of 1934 Petitioners misrepresented and omitted to disclose material information in their public statements concerning UJB. In particular, Respondents allege, on information and belief, that Petitioners knowingly or recklessly misrepresented the adequacy of UJB's provisions for loan losses, and the quality and effectiveness of UJB's procedures for monitoring loans and for ensuring that there were adequate reserves for potential problem loans.[3]

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[2] The complaint that Petitioners attack is Respondents' *first* consolidated complaint, and not Respondents' fourth complaint, as Petitioners misleadingly claim. *See* Pet. at 4.

[3] The opinion below, which is reproduced in the Appendix accompanying the petition for writ of *certiorari* at A-1 through A-35, contains a more detailed description of Respondents' allegations, including direct quotations of important portions of

Petitioners attacked Respondents' complaint in the District Court on several fronts. Petitioners sought dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted, and claimed that the complaint does not allege fraud with particularity sufficient to satisfy Rule 9(b) of the Federal Rules of Civil Procedure. The District Court, in response to Petitioners' motion, dismissed Respondents' complaint. According to the District Court, certain of the complaint's allegations failed to plead violations of federal law, while others failed to allege with particularity fraudulent conduct. (*See* A-38-50.)

On appeal, the Court of Appeals for the Third Circuit affirmed the District Court's judgment in part, reversed it in part, and remanded the case to the District Court. *See Shapiro v. UJB Financial Corp.*, 964 F.2d 272 (3d Cir. 1992) (A-1-35). The Court of Appeals agreed with the District Court's determination that portions of Respondents' complaint failed to state claims under the federal securities laws. However, the Court of Appeals also determined that when the complaint is examined against controlling precedent, particularly this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749 (1991), aspects of Respondents' complaint did state claims under federal law. In this regard, the Third Circuit, adhering to this Court's decision in *Virginia Bankshares*, noted that where

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Respondents' consolidated complaint. Respondents respectfully refer the Court to the opinion of the court below for further detail concerning Respondents' allegations. (*See* A-3 to A-10.)

corporate officers comment on the internal affairs of a corporation, these comments are likely to be material to investors, given corporate insiders' superior access to information and the importance that investors place on corporate insiders' statements. The Third Circuit, again consistent with this Court's holdings, repeated what is a fundamental truth in the realm of federal securities laws: when corporate insiders speak on material matters, they must speak truthfully. (*See* A-17-22.)

With respect to Petitioners' attacks below on the specificity of Respondents' complaint, the Court of Appeals concluded that the complaint lacked allegations sufficient to satisfy Rule 9(b)'s pleading requirements. In assessing the particularity of Respondents' complaint, the Court of Appeals noted, unremarkably, that oftentimes in the context of a securities fraud action, the operative facts are exclusively in the defendants' possession, a circumstance that inhibits a plaintiff from alleging the underlying facts on personal knowledge and to an exacting degree of particularity. (*See* A-22-25.) Courts in and out of the Third Circuit, recognizing this circumstance, have for decades allowed plaintiffs to plead fraud on information and belief where the underlying facts are within the defendants' exclusive knowledge or control, provided that the plaintiffs provide a statement of facts upon which their information and belief is founded. *See, e.g., In re Craftmatic Sec. Litig.*, 890 F.2d 628, 646 (3d Cir. 1989); *Duane v. Altenburg*, 297 F.2d 515, 518 (7th Cir. 1962). The Third Circuit, in its opinion below, emphasized that a plaintiff must still allege in detail all efforts that he made to uncover specific facts to support any information and belief that fraud has occurred. The Court of Appeals

concluded that Respondents' complaint failed to include this necessary detail. (*See* A-23-25.)

The court below specifically ordered Respondents to redraft their complaint. In the Court of Appeals's view, Respondents' complaint intermingled actionable and inactionable claims. Respondents, therefore, are required to reorganize their complaint, without adding new information, to allow for an assessment of the allegations that the Third Circuit found to be actionable. (*See* A-22.) Further, because the complaint did not contain allegations required to satisfy Rule 9(b), Respondents must add specific allegations concerning their efforts to uncover facts in support of the alleged fraud. (*See* A-24-25.) Thus, Petitioners ask this Court to review prematurely a complaint that the Court of Appeals has ordered plaintiffs to rewrite.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners have failed to demonstrate that there is any need for this Court to review the Third Circuit's decision. The decision below represents neither a departure from prior case law, nor a conflict with case law applicable in every Circuit in the United States. Further, the court below did not determine that any of Respondents' allegations were sufficiently particular. In fact, the court below ordered Respondents to rewrite their complaint.

1. THE THIRD CIRCUIT'S HOLDING CONCERNING RULE 9(b) DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS, WITHIN THE THIRD CIRCUIT, OR CONFUSION AMONG THE DISTRICT COURTS

Petitioners expend considerable energy in an effort to conjure up a conflict to justify their seeking a writ of *certiorari*. The proffered conflicts, however, are all illusions.

Petitioners premise their claims that this Court's intervention is necessary on a distorted interpretation of the opinion below, which they claim substantially lowers a pleader's burden under Rule 9(b). However, the opinion below is quite unremarkable in its limited conclusion that a pleader must allege all investigative efforts in detail before a court can, in applying Rule 9(b), consider whether facts are peculiarly within an adverse party's control.

Petitioners, having obscured the plain meaning of the opinion below, take their distorted interpretation and compare it to decisions of the First, Second, and Seventh Circuits and to an order of a separate Third Circuit panel to create the illusion of conflicts. Also, Petitioners juxtapose a range of district court decisions on the application of Rule 9(b) to individual complaints and use the crafted array of results to create an illusion of what they claim is "confusion." However, when the smoke, mirrors, and manipulation are cleared away, it is apparent that there are no conflicts, whether inter- or intra-Circuit, and that Petitioners have demonstrated nothing more than a difference in results attributable to variations in the factual patterns in which cases arose.

a. The Third Circuit Did Not Deviate From Existing Interpretations of Rule 9(b)

In assessing Petitioners' request that this Court review the Third Circuit's decision, it is important to focus upon what the court below actually held, as distinguished from Petitioners' embellished contortion of the Third Circuit's conclusion. The Third Circuit *did not* conclude, as Petitioners claim, that a plaintiff can satisfy Rule 9(b)'s particularity requirement simply by alleging that the facts underlying the asserted fraud are peculiarly within the adverse party's control, and that the plaintiff has undertaken as complete an investigation as possible. The Third Circuit determined only that, where a pleader seeks to have a court take into consideration that the facts concerning an alleged fraud are within the exclusive control of the adverse party in determining whether the pleader has alleged fraud in compliance with Rule 9(b), the pleader must specifically allege any efforts to obtain the facts. (*See* A-24.) In concluding that Respondents' complaint as drafted does not satisfy Rule 9(b), the court below emphasized that even where facts are peculiarly within the possession and control of an adverse party, a plaintiff must still provide a specific factual basis to support his allegation. (*Id.*) *See* Jay B. Kasner, Rita W. Gordon, *Shareholder Suits: Ruling a Victory for Banks,* American Banker, August 5, 1992, at 4 ("Significantly, . . . the appeals court reaffirmed that plaintiffs must specifically provide a factual basis for their allegations of fraudulent conduct . . . .").

This interpretation of Rule 9(b) is not new. Courts in the Third Circuit have recognized for years that Rule 9(b)

must be applied flexibly where an adverse party is in control of all the facts. *See, e.g., Denny v. Carey,* 72 F.R.D. 574, 580 (E.D. Pa. 1976); *cf. Chambers Development Co. v. Browning-Ferris Indus.,* 590 F. Supp. 1528, 1539 (W.D. Pa. 1984) (granting plaintiff an opportunity to take discovery for 60 days to amend RICO allegations where information concerning mail or wire fraud was in adverse party's control); *Eaby v. Richmond,* 561 F. Supp. 131, 137 (E.D. Pa. 1983) (same). In *Christidis v. First Pennsylvania Mortgage Trust,* 717 F.2d 96 (3d Cir. 1983), from which Petitioners claim the decision below deviates, the Third Circuit specifically noted that:

> In applying the first sentence of Rule 9(b) courts must be sensitive to the fact that its application, prior to discovery, may permit sophisticated defrauders to successfully conceal the details of their fraud. Moreover, in applying the rule, focusing exclusively on its "particularity" language "is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules."

Id. at 99-100 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure,* § 1298 at 407 (1969)).

Following *Christidis,* the Third Circuit, in its decision in *In re Craftmatic Sec. Litig.,* 890 F.2d 628 (3d Cir. 1989), reaffirmed that Rule 9(b) must be applied flexibly, but that even under a flexible approach, a pleader must adduce facts sufficient to support a claim of fraud. As the court explained:

> Under a flexible application of Rule 9(b), plaintiffs need not necessarily allege the specific information at defendants' disposal at the time

> the [alleged misrepresentations] were made. However, plaintiffs must accompany their allegations with facts indicating why the charges against defendants are not baseless and why additional information lies exclusively within defendants' control.

Id. at 646.

The opinion below is indistinguishable from the Third Circuit's conclusions in *Christidis* and *Craftmatic*. In all three cases, the Third Circuit recognized that a pleader's inability to access facts is to be considered in evaluating whether fraud has been pleaded with sufficient specificity. The opinion below only emphasizes that a pleader must disclose his investigative efforts before a court can evaluate whether, under the circumstances, there is sufficient particularity to comply with Rule 9(b)'s dictates. (*See* A-23-24.)

b. There is No Intra-Circuit Conflict That Requires Resolution

Petitioners contend that this Court's review is necessary to resolve a conflict between the opinion below and a summary affirmance by a separate Third Circuit panel of a District Court's order, which, in turn, was a summary affirmance of a Magistrate's Report and Recommendations. Even the most cursory comparison of the supposedly "conflicting" decisions belies Petitioners' contention.

On May 20, 1992, the day on which the Third Circuit issued its opinion in this case, a separate panel of that court affirmed, with a judgment order, the District Court's dismissal of the complaint in *Decker v. Landmark Savings*

Assoc., No. 91-3776, slip op. (3d Cir. May 20, 1992) (judgment order) (A II-6). In *Landmark*, the District Court, in a memorandum order, affirmed a Magistrate's Report and Recommendations. (*See* A II-7.) Thus, according to Petitioners, a one paragraph judgment order summarily affirming, without any analysis or explanation, a five paragraph memorandum order, which likewise lacked any real explanation, affirming a Magistrate's recommendations creates a conflict with a separate panel of the Third Circuit, which issued a multi-page decision detailing its reasoning. Apart from the fact that under the Third Circuit's Internal Operating Procedures, a judgment order is never published and, therefore, lacks any value as a precedent, *see* Third Cir. Int. Op. Pro. 5.5.2 and 5.6, to characterize Petitioners' claim as overreaching is to be charitable.[4]

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[4] There are two curious aspects to Petitioners' argument in this regard. First, in quoting the Third Circuit's judgment order in their petition, Petitioners exclude a critical word: "essentially." Contrary to Petitioners' claim, the judgment order does not affirm the dismissal of the *Landmark* complaint for the "*same* reasons" as those recommended by the Magistrate, but for "*essentially* the same reasons." (A II-6 (emphasis added).)By qualifying its judgment order with the word "essentially," the Third Circuit panel left substantial doubt as to the precise reasons for its affirmance. From the judgment order, it is impossible to tell what parts of the Magistrate's reasoning the panel did and did not endorse. Moreover, the rationale underlying the Magistrate's two Reports and Recommendations are themselves somewhat difficult to discern, to the extent that issues concerning Rule 9(b) are intermingled with issues concerning arguable failures to state claims upon which relief can be granted.

Second, Petitioners, although they claim that the *Landmark* complaint and the complaint in this litigation are similar, have failed to submit a copy of either complaint as part of the Appendix. Petitioners' failure to submit either Respondents' complaint or the *Landmark* complaint causes one to ask what Petitioners

That there is no conflict between the two panel decisions is underscored by the fact that the Third Circuit rejected Petitioners' petition for rehearing *en banc*, in which Petitioners posited the same illusory "conflict" that they present here. (*See* A-51-52.) If the judges of the Third Circuit believed there is a conflict between this case and *Landmark*, they would have sought to resolve it.[5] They did not, and denied Petitioners' petition for rehearing.

c. The Circuits Are Uniform in Considering Whether Facts Are in the Exclusive Possession of an Adverse Party in Applying Rule 9(b)

Petitioners rely principally upon three decisions to create their claimed inter-Circuit conflict: *Romani v. Shearson Lehman Hutton*, 929 F.2d 875 (1st Cir. 1991), *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir.), *cert. denied*, 111 S.

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are trying to hide. The answer is simple: that decisions concerning the application of Rule 9(b) turn on the allegations peculiar to any complaint. The Magistrate's Report and Recommendations in the *Landmark* case makes clear that the recommendation to dismiss pursuant to Rule 9(b) is grounded entirely on the allegations in that case. The standard that the Magistrate applied to reach her conclusion is no different than the standard applied in the Third Circuit before and after the opinion below. (*See* A II-18-23 (applying standards set out in *In re Craftmatic Sec. Litig.*).)

[5] In any event, even if it is assumed that there is a conflict, it is a conflict that the Third Circuit in the first instance should resolve. *Cf. Davis v. United States*, 417 U.S. 333, 340 (1974) (noting previous denial of *certiorari* despite acknowledged conflict between two decisions of a single circuit).

Ct. 347 (1990), and *Denny v. Barber*, 576 F.2d 465 (2d Cir. 1978). According to Petitioners, these three decisions establish that the First, Second, and Seventh Circuits apply Rule 9(b) differently than does the Third Circuit in the decision below. These three decisions, however, do nothing of the sort.

With respect to the First and Second Circuits, Petitioners themselves concede that "these courts have relaxed somewhat the rigorous pleading standard under Rule 9(b) where the plaintiff has alleged that the facts lie solely within defendants' control. *See, e.g., DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1217 [sic] (2d Cir. 1987); *Wayne Investments [sic] v. Gulf Oil Corp.*, 739 F.2d 11, 13-14 (1st Cir. 1984)." (Pet. at 14.) This concession is fatal to Petitioners' claim that there is any conflict between the First and Second Circuits and the decision below.[6]

The First Circuit's *Romani* decision is, in any event, squarely consistent with the decision below. The First Circuit, in *Romani*, stated that "[w]here allegations of fraud are explicitly or, as in this case, implicitly, based

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[6] Petitioners also cite 2A James W. Moore & Jo Desha Lucas, *Moore's Federal Practice* ¶ 9.03 [1], at 9-27-9-28 (2d ed. 1991) ("where the facts are in the exclusive possession of the adversary, courts should permit the pleader to allege the facts on information and belief, provided a statement of the facts upon which the belief is founded is proffered") in support of their contention that the application of Rule 9(b) in other Circuits is somehow different from the Third Circuit's approach. However, the Third Circuit, in its decision below, cited with approval this same passage from *Moore's*. (*See* A-24.) It is hard to conceive of a reason why the Third Circuit would rely on this passage from *Moore's* if it was expressing a thought inconsistent with *Moore's*.

only on information and belief, the complaint must set forth the source of the information and the reasons for the belief." *Romani*, 929 F.2d at 878. This statement is indistinguishable from the statements in the opinion below that Petitioners attack in their petition.[7] *Cf. New England Data Services, Inc. v. Becher*, 829 F.2d 286, 290-91 (1st Cir. 1987) (where specific information as to use of interstate mail or telecommunications for RICO claims "is likely in the exclusive control of the defendant," court should determine whether the plaintiff should have the opportunity to take discovery and then amend an otherwise defective complaint).

The Second Circuit cases too are indistinguishable from the decision below in terms of their analysis of Rule 9(b) where facts are within the exclusive control of an adverse party. *See, e.g., Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990) (fraud allegations "may be based on information and belief when facts are peculiarly within the opposing party's knowledge," and complaint pleaded on information and belief must adduce specific supporting facts); *Ouaknine v. MacFarlane*, 897 F.2d 75, 81 (2d Cir. 1990) (concluding that allegations of scienter were sufficient where "allegations lie peculiarly within

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[7] In upholding the dismissal of a complaint for failing to plead fraud with the requisite specificity, the court in *Romani* conducted an inquiry concerning the specific allegations at hand. It upheld the dismissal because "[t]he complaint contains no factual allegations that would support a reasonable inference that adverse circumstances existed at the time of the offering, and were known and deliberately or recklessly disregarded by defendants." 929 F.2d at 878. Once again, the decision turned on the allegations of the particular complaint under consideration.

the opposing party's knowledge and are accompanied by information that raises a strong inference of fraud."); *Nicholas v. Poughkeepsie Savings Bank/FSB*, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,606 at 97,839-97,841 (S.D.N.Y. 1990) ("[T]he Second Circuit has repeatedly recognized that the requirements of Rule 9(b) are to be relaxed where the facts are 'peculiarly within the adverse party's knowledge.' ") (quoting *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972)).

The Second Circuit's decision in *Denny v. Barber* does not create a conflict between the Second and Third Circuits. In that case, the specific complaint at issue contained *no* allegedly misleading statements before the plaintiff's stock purchases. 576 F.2d at 468-69. In addition, the plaintiff alleged that the defendants failed to disclose the risks involved in certain investments that collapsed several years later. In upholding the dismissal of the complaint, the Second Circuit, in an opinion written by Judge Friendly, determined that the plaintiff had failed to allege how, other than through "greater clairvoyance," the defendants could possibly have known or forecast that future events would cause the investments to fail. *Id.* at 470. Nowhere do Petitioners explain how *Denny*, which does not address the application of Rule 9(b) where facts are in the exclusive possession of an adverse party, is more apposite than later Second Circuit decisions that explicitly discuss that situation.[8]

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[8] Petitioners, at several points, invoke *Denny's* "fraud by hindsight" language as part of their general hyperbolic reaction to the opinion below. *Denny's* "fraud by hindsight" language cannot be understood to preclude a plaintiff from relying on

The Seventh Circuit's decision in *DiLeo* also does not pose a conflict with the decision below. In *DiLeo*, the Court of Appeals upheld the dismissal of a Section 10(b) claim against an accounting firm that audited the financial statements of a financial institution, Continental Illinois. The plaintiffs in *DiLeo* alleged, *inter alia*, that Continental Illinois's loan loss reserves were inadequate and that Continental Illinois did not timely write off loans. The Court of Appeals held that the complaint in that case did not allege any facts that would establish that prior "rosy" statements were attributable to "fraud" simply because Continental Illinois later experienced losses and that the complaint alleged only " 'fraud by hindsight' ." 901 F.2d at 627-28 (quoting *Denny v. Barber*, 576 F.2d at 470)).[9] In so doing, the Seventh Circuit specifically noted

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later facts to establish that a defendant's previous representations are false or misleading. There is no inherent evil in a plaintiff basing allegations of fraud on subsequent disclosures concerning a business's internal affairs. As one court has written:

> [Where] the information directly involved the Bank's financial condition and business practices . . . it may be an appropriate inference that the nature and extent of the Bank's subsequent disclosures are evidence that the matters disclosed did not suddenly come to light.

Nicholas v. Poughkeepsie Savings Bank/FSB, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,606 at 97,841; *see also Robbins v. Moore Medical Corp.*, 788 F. Supp. 179, 192 (S.D.N.Y. 1992) ("[T]he *Denny* court recognized that fraud by hindsight decisions 'may or may not be consistent and . . . necessarily rest[ ] on [their] particular facts.' ") (quoting *Denny*, 576 F.2d at 470).

[9] Petitioners seize on the Seventh Circuit's statement in *DiLeo* that "[b]ecause only a fraction of financial deteriorations reflects fraud, plaintiffs may not proffer the different financial

that there had been a "flood" of public information, including several lawsuits and at least one full trial, from which the plaintiffs could have obtained relevant information to provide exacting detail for their complaint.

DiLeo does not present a conflict with the decision below because it is factually and legally inapposite. First, *DiLeo* involved an outside accounting firm, while the decision below involved corporate insiders. Courts have generally construed Rule 9(b) more stringently with respect to such third parties, *see, e.g., In re Frank B. Hall & Co., Inc.*, 693 F. Supp. 1460, 1462 (S.D.N.Y. 1988) ("*de facto* enhanced pleading requirement . . . has developed under Rule 9(b) . . . for outside professionals"); *Greenfield v. Professional Care, Inc.*, 677 F. Supp. 110, 114 (E.D.N.Y. 1987) ("when inside directors are involved inferences of fraud may be drawn that might otherwise not be permissible."). Second, as noted above, there had been a "flood of [public] information," including evidence presented publicly during a five month jury trial, regarding Continental Illinois and its financial condition *before* the *DiLeo* complaint was filed; in contrast, in this litigation, there was virtually no public information about UJB's internal

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statements and rest. Investors must point to some facts suggesting that the difference is attributable to fraud." *DiLeo*, 801 F.2d at 627 (cited in Pet. at 9). According to Petitioners, this quotation serves to crystalize the conflict between the Seventh and Third Circuits. As an initial matter, there is no conflict between the *DiLeo* court's conclusion that a pleader must "point to" facts suggesting that fraud has occurred and the Third Circuit's application of Rule 9(b). Moreover, the Seventh Circuit's premise, *i.e.*, that only a fraction of financial deteriorations reflects fraud, is an unsupported factual conclusion at which the Seventh Circuit arrived without citation.

financial condition that Respondents could access. In short, *DiLeo* and the decision below address two markedly different factual situations: fraud claims against corporate insiders where the underlying facts are exclusively within the adverse parties' possession (the decision below) as compared with fraud claims against outsiders where there is a substantial amount of publicly available information (*DiLeo*).

By contrast, 30 years ago, when the Seventh Circuit did address the same issue as addressed in the court below, it reached an identical conclusion:

> [P]leading on "information and belief" is permissible as to matters peculiarly within the adverse party's knowledge . . . [and] allegations of fraud such as are here involved when made on "information, and belief" must be accompanied by a statement of the facts upon which the belief is founded.

Duane v. Altenburg, 297 F.2d 515, 518 (7th Cir. 1962) (upholding dismissal of complaint that lacked statement of facts upon which information and belief was founded).

Indeed, it appears that the law on the specific issue addressed in the decision below is uniform throughout the land: where facts are peculiarly within an adverse party's knowledge, that circumstance is taken into consideration, *i.e.*, fraud may be pleaded on "information and belief," but pleaders "must accompany such an allegation with a statement of facts upon which their allegation is based." (A-24.) *See Scheidt v. Klein*, 956 F.2d 963, 967 (10th Cir. 1992) ("Allegations of fraud may be based on information and belief when the facts in question are peculiarly within the opposing party's knowledge and

the complaint sets forth the factual basis for the plaintiff's belief."); *Michaels Building Co. v. AmeriTrust Co., N.A.*, 848 F.2d 674, 680 (6th Cir. 1988) (noting that "[c]ourts have held that the rule may be relaxed where information is only within the opposing party's knowledge."); *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987) (allegations of fraud may be upon information and belief where the plaintiff cannot have personal knowledge of the underlying wrongdoing; "[i]n such cases, the particularity requirement may be satisfied if the allegations are accompanied by a statement of the facts upon which the belief is founded."); *Kowal v. MCI Communications Corp.*, No. 90-2862 JGP, U.S. Dist. LEXIS 7437, at *21 (D.D.C. May 19, 1992) (allegations of fraud may be upon information and belief "as to matters peculiarly within the knowledge of the opposing party. . . . Even with respect to matters within the knowledge of the other party, the allegations must be accompanied by a statement of the facts upon which the belief is founded."); *U.S. ex rel. Stinson, Lyons, et. al. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1040, 1052 (S.D. Ga. 1990) ("Where . . . factual information is peculiarly within the defendant's knowledge or control, rule 9 (b)'s requirement is relaxed somewhat. In such a case, pleading on information and belief is acceptable . . . but on one condition: the complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.") (citation omitted); *Burt on behalf of McDonnell Douglas v. Danforth*, 742 F. Supp. 1043, 1050 (E.D. Mo. 1990) ("[C]omplaining stockholders need not specify facts that are peculiarly within the opposing party's knowledge and more general allegations will suffice

as long as an attempt is made to comply with Rule 9(b) and the allegations are accompanied by a statement of the grounds on which the stockholder's belief rests.") (citations omitted); *Steiner v. Southmark Corp.*, 734 F. Supp. 269, 273 (N.D. Tex. 1990) (Rule 9(b) "may be relaxed . . . as to matter within the opposing party's knowledge. . . . In such cases, allegations satisfy Rule 9(b) if accompanied by a statement of the facts upon which the belief is based. . . . ") (citations omitted); *Sweeney Co. of Maryland v. Engineers-Constructors, Inc.*, 109 F.R.D. 358, 360 (E.D. Va. 1986) ("If plaintiffs do not have access to information, some relaxation of Rule 9(b) is necessary when plaintiffs are not likely to have more specific information until after discovery.") (citations omitted).[10] In short, Petitioners' asserted conflict does not exist as between the Third Circuit and any other court.

d. Rule 9(b) Decisions Involve Assessments of Individual Complaints

Petitioners' assertion that there is confusion at the district court level disregards the fact that, in the first

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[10] *See also Koch v. Koch Industries*, No. 85-1636-C, U.S. Dist. LEXIS 10952 (D. Kan. June 30, 1992); *In re VMS Sec. Litig.*, 752 F. Supp. 1373, 1391-92 (N.D. Ill. 1990); *Fairmont Homes, Inc. v. Shred Pax Corp.*, 754 F. Supp. 665, 667 (N.D. Ind. 1990); *F.D.I.C. v. Kerr*, 637 F. Supp. 828, 834 (W.D.N.C. 1986); *Texaco, Inc. v. Roberts*, No. 90-359, U.S. Dist. LEXIS 5180 (E.D. La. May 3, 1990); *Banowitz v. State Exchange Bank*, 600 F. Supp. 1466, 1469 (N.D. Ill. 1985); *cf. Seattle-First National Bank v. Carlstedt*, 800 F.2d 1008, 1011 (10th Cir. 1986).

instance, any determination of whether Rule 9(b)'s particularity requirement has been satisfied requires an assessment of the complaint at hand. The various cases that Petitioners attempt to contrast with each other (*see* Pet. at 10-11, 18-19) only underscore the point that Rule 9(b) requires a complaint specific determination of whether fraud has been pleaded with sufficient particularity.

The decision in *Urbach v. Sayles*, 779 F. Supp. 351 (D.N.J. 1991), illustrates the fact that the various decisions applying Rule 9(b), which Petitioners cite as evidence of "confusion," each turn almost entirely on the specific allegations of the particular complaint at hand, and not on any supposed variation in the standards for applying Rule 9(b). In that opinion, the District Court rejected arguments substantially similar to Petitioners' arguments here in ruling on a motion to certify an interlocutory appeal. In analyzing an alleged conflict between opinions applying Rule 9(b) at the district court level (a conflict that supposedly resulted from the decision in *Fox v. Equimark Corp.*, 782 F. Supp. 295 (W.D. Pa. 1991) and the District Court's opinion in this litigation (*See* A-38 to A51)), the District Court surveyed the authority on the application of Rule 9(b), including the Third Circuit's decisions in *Christidis*, 717 F.2d 96 (3d Cir. 1983), and *Craftmatic*, 800 F.2d 628 (3d Cir. 1989), the District Court's opinion in *Fox*, the Seventh Circuit's decision in *DiLeo*, 901 F.2d 624 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990), the Second Circuit's decision in *Denny*, 576 F.2d 465 (2d Cir. 1978), and the District Court's opinion in this litigation. The *Urbach* court concluded that all the opinions

applied similar standards in reaching their conclusions concerning Rule 9(b). *See* 779 F. Supp. at 358-64 ("Although the authorities cited by defendant rejected plaintiffs' fraud claims for failure to satisfy Rule 9(b), the showing of particularity there required is no different from the standard enunciated by this Court and satisfied by the plaintiff."). As the District Court's analysis in the *Urbach* case demonstrates, the purported "confusion" at the district court level is not confusion at all but, rather, is simply different results reached by different judges analyzing different complaints under the same Rule 9(b) standards. *See Robbins v. Moore Medical Corp.*, 788 F. Supp. at 191-92.

e. Whether the Complaint's Allegations Satisfy Rule 9(b)'s Particularity Requirement Does Not Warrant This Court's Attention

The issue of whether a complaint alleges fraud with sufficient particularity, as demonstrated above, turns upon the complaint's allegations and points up an additional reason for declining to issue a writ: Petitioners are asking the Court to review a single complaint, which the Court of Appeals already directed Respondents to rewrite, to determine whether that complaint satisfies Rule 9(b). This inquiry, which is manifestly premature and can be of interest only to the parties to this litigation, does not justify a writ of *certiorari*. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) (writs should not be granted to settle principles of interest only to the parties as opposed to principles of interest to the public); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Whether the complaint in this litigation –

after it is rewritten and refiled as directed by the Third Circuit – ultimately pleads fraud with sufficient particularity will not resolve a dispute of sufficiently general application to warrant this Court's review. Other litigants and other courts will still have to answer for themselves whether, under the circumstances peculiar to the cases confronting them, Rule 9(b) has been satisfied.

Further, whether Respondents have satisfied Rule 9(b)'s particularly requirements is entirely speculative and hypothetical, given the Court of Appeals's direction that Respondents rewrite their complaint to excise inactionable allegations, to clarify their claims, and to add allegations injecting specificity as to their investigation of the fraudulent conduct at issue. Under these circumstances, this Court's limited resources should not be expended in an effort to determine whether an earlier version of Respondents' complaint satisfied Rule 9(b).

f. The Third Circuit's Decision Furthers Rule 9(b)'s Policies

Petitioners contend that this Court must intervene in this litigation because the decision below undercuts Rule 9(b)'s policies. However, the opinion below is entirely consistent with, and indeed furthers, those policies. The Third Circuit's requirement that a plaintiff specifically aver his efforts to uncover information allegedly in the exclusive control of an adverse party is not, as Petitioners characterize it, an endorsement of a "shoot first and ask questions later" approach to litigation. By requiring detailed allegations concerning a plaintiff's investigation of facts that the plaintiff claims cannot be reached, the

Third Circuit is ensuring that fraud claims are scrupulously examined before the commencement of litigation. (*See* A-24.) Further, even a party's scrupulous investigation cannot save a defective complaint if that scrupulous investigation does not yield the information and belief necessary to particularize allegations of fraud. *See Christidis*, 717 F. 2d at 100; *see also Michaels Building Co. v. AmeriTrust Co., N.A.*, 848 F.2d at 679-681.

2. THE THIRD CIRCUIT'S STATEMENT ON MATERIALITY IS CONSISTENT WITH THIS COURT'S DECISIONS

Petitioners, in addition to their attack on the Third Circuit's unremarkable discussion of Rule 9(b), claim that the discussion in the decision below of whether statements are actionable under the federal securities laws is somehow inconsistent with decisions of this Court. In particular, Petitioners assert that the Court below erred when it stated that "by addressing the quality of a particular management practice, a defendant declares the subject of its representation to be material to the reasonable shareholder, and thus is bound to speak truthfully" (A-18), because it purportedly "ignores" this Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). It is Petitioners, however, and not the Third Circuit, who have ignored controlling precedent from this Court.

Petitioners' argument once again distorts the ruling of the court below. The statement that Petitioners attack flows from the Court of Appeals's analysis of whether certain alleged misstatements are actionable under the federal securities laws. In concluding that some are and

others are not, the court below did not hold that the fact that a corporate officer or director utters a statement automatically makes that statement material. The Court of Appeals simply recognized the significance that stock purchasers can place on corporate insiders' statements concerning internal corporate affairs about which insiders can be expected to have superior knowledge.

The court below's statement in this regard is nothing more than the logical application of this Court's conclusion in *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749 (1991). In *Virginia Bankshares*, this Court stated:

> [T]here is no room to deny that a statement of belief by corporate directors about a recommended course of action, or an explanation of their reasons for recommending it, can take on . . . importance [to a reasonable shareholder in deciding how to vote]. Shareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources, and the directors' perceived superiority is magnified even further by the common knowledge that state law customarily obliges them to exercise their judgment in the shareholders' interest.

Id. at 2757.

As the court below explained, after quoting the above language:

> If a director's statement of belief is material because of the speaker's superior knowledge, then a manager's statement of belief must also be material. A manager's knowledge and expertise regarding the day-to-day operation of his company generally exceeds that of a director,

> and the reasonable investor is aware of this fact. Even if management sometimes acts in its own interest, a reasonable investor need not take a manager's statement of belief at anything less than face value.

(A-19.)

Petitioners no doubt are fully aware of this Court's *Virginia Bankshares* decision, particularly since it was cited and quoted in the opinion below. However, Petitioners totally ignore the *Virginia Bankshares* case (they do not even cite it in their petition) and instead look to this Court's holding in *Basic Inc. v. Levinson* in a feeble effort to manufacture another (non-existent) conflict.

Basic, though, is of no aid to Petitioners. This Court in *Basic* did not address the question of whether statements by a corporation's officers and directors about internal corporate affairs are actionable. Rather, *Basic* addresses only the question of when in the course of merger discussions the existence of such discussions becomes material and must be disclosed publicly. *See* 485 U.S. at 236-241. *Virginia Bankshares*, on the other hand, directly addresses the question of when affirmative statements by corporate directors become significant to reasonable investors. *Virginia Bankshares*, thus, provides the appropriate guidepost for assessing the Third Circuit's discussion of the potential importance of corporate insiders' comments. The Court of Appeals's statement is entirely consistent with *Virginia Bankshares*.

Further, Petitioners cannot question seriously the Third Circuit's statement that material statements by corporate officers and directors must be truthful. It is a

fundamental principle of securities law, of which Petitioners should have been aware from reading *Basic*, that material representations must not be false or misleading. *See Basic*, 485 U.S. at 238. There is, then, no conflict between the opinion below and this Court's prior holdings.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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Respectfully submitted,

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